APPENDIX "A".

Petitioner argues that the lands should be valued without consideration of the mineral rights therein which petitioner transferred to the trust. We do not agree with petitioner in this regard. The evidence shows that whatever mineral rights petitioner had in these lands and transferred to the trust were not included either in petitioner's gift tax return or respondent's notice of deficiency in the separate valuation of mineral rights but that those valuations included only mineral rights, the surface rights of which were not transferred by petitioner to the trust. Therefore, in valuing these lands we have considered the fact that petitioner owned and transferred to the trust all the mineral interests in the Clayton and Walter Mitchell tract and a part of the mineral interests in the Barron, Sartin, and Stevens tracts. When Bryant purchased the Clayton and Walter Mitchell tract for petitioner in 1945 he considered there was a value in mineral rights in the property in excess of the amount he paid for the land. In arriving at the fair market value of this tract we have given consideration to the fact that there were some trees growing on the land which were below the merchantable size as of April 22, 1958, as well as merchantable timber on the land.

Respondent in his argument has assumed that there would be approximately 10 percent less merchantable timber on the Clayton and Walter Mitchell tract on April 22, 1958, than there was on that land

when the timber was cut in 1960 and 1961. Petitioner argues that there would be approximately 20 percent less timber on April 22, 1958, than when the timber was cut. Both parties accept the fact that the rate of growth of the type of timber growing on the lands which were cut over in 1960 and 1961 was approximately 5 percent a year. The evidence shows that the main growth occurred in the spring and summer. From the dates of receipts for timber, it is apparent that the timber was not cut ratably over the entire period from February 1960 to August 1961, but that most of it was cut between February 1960 and March 1, 1961. We have therefore considered that the growth on the average between the date the properties were transferred to the trust on April 22, 1958, and the date the timber was cut was approximately 12-1/2 percent and have estimated the quantity and value of merchantable timber on the Clayton and Walter Mitchell tract and other properties on which cutting took place accordingly.

We have also considered the testimony of certain of petitioner's expert witnesses that bare timberlands without any timber growth and without any development or reseeding work, if being purchased for timber growing uses only, without consideration to mineral values or other possible uses for the land, would have a value in the area in which petitioner's lands were located of from $5 to $10 per acre. However, we have not considered that this amount constitutes the fair market value of lands in which all or a portion of the mineral rights were transferred by

petitioner to the trust and which contained young growth in most instances when transferred to the trust and which had other potential uses when transferred to the trust. We have recognized that the value to be placed on the lands should give recognition to the young growth and the mineral interests which were transferred to the trust as well to the bare land value. We have given consideration to all of these factors in the land values we have determined for the Clayton and Walter Mitchell, Barron, Stevens, and Sartin tracts, as well as to our conclusion as to a proper estimate of the merchantable timber on those tracts and the value thereof when they were transferred to the trust on April 22, 1958. In our valuation of the Clayton and Walter Mitchell, J. O. Barron, Stevens, and Sartin tracts we have considered the testimony of the expert witnesses for both petitioner and respondent. To a large extent the variations in their testimony were with respect to the merchantable timber and young growth on the land on April 22, 1958, and our conclusion from all this testimony is reflected in our ultimate finding as to the value of each of these tracts.

A substantial portion of the testimony in the record deals with the Gavin tract. Petitioner contends that this was very poor timber growing land and that at the time it was transferred to the trust it had timber growth which would not produce more than one-half a cord of pulpwood an acre and no other merchantable timber. Petitioner's witness testified that the young growth on this land was negligible.

The record shows that petitioner owned one-fourth of the mineral interests under the Gavin tract and that in 1954 petitioner had paid $10 an acre for this property. It also shows that this land was well located as to roadways so that it had potential uses for purposes other than timber growing. The evidence also shows that Bryant, when he purchased this land for $10 an acre in 1954, had considered that the one-fourth mineral rights obtained were worth approximately that amount. Petitioners, on their returns, valued this property at $25 an acre for a total value of $82,000. All of petitioner's witnesses including Bryant, indicated that they considered that the Gavin tract had merchantable timber in operable quantities. Considering all of the testimony with respect to this tract we have concluded that its fair market value at April 22, 1958, is the amount of $82,000 as used by petitioner in arriving at the value reported on his gift tax return.

The testimony is uniform that the timber on the Black and Hathorn tract was of good quality both as to merchantable timber and young growth. There was at least $10,000 in value of sawtimber on this land as of April 22, 1958, and in addition some pulpwood and a good stand of young growth. Petitioner owned no mineral rights in the Black and Hathorn tract and transferred none to the trust. Considering all of these factors we have determined that the fair market value of the tract when it was transferred to the trust was $41,000.

The last issue concerns the portion of the value of the properties transferred to the trust which should be allocated to the trust created for Bryant. Both parties recognize that there was consideration for the transfer to Bryant and that this transfer did not constitute a gift. Both parties also recognize that the value of the total properties transferred to the trust should be reduced by the value of the properties allocable to the trust created for Bryant. The issue is now to arrive at this value.

DECISION OF THE COURT.

(Title Omitted—No. 5715-63) (Filed: June 3, 1966)

Pursuant to the opinion of the Court filed February 24, 1966, and the agreed computation of the tax liability filed by the parties; and incorporating herein the facts recited in the computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in gift tax due from the petitioner for the year 1958 in the amount of $51,968.70.

s/ IRENE F. SCOTT
Judge.

(Seal)

Entered:
ENTERED JUN 7 1966

APPENDIX "B".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24299

MARGARET THOMAS POWE, WILLIAM A. POWE,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of Decision of the Tax Court of the United States (Mississippi Case.)

(December 18, 1967.)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: On April 22, 1958, petitioners, husband and wife, created an irrevocable trust for the benefit of various members of their family. The property conveyed, among other items consisted of nine parcels of land. A gift tax return, filed for the year 1958, reported the fair market value of the nine parcels as $326,630.00. The Commissioner of Internal Revenue, in a deficiency notice, increased the valuation to $664,179.00. In a hearing before the Tax Court, following the deficiency assessment the total value of the land involved was fixed at $531,970.00. We affirm.

The principle questions involved are: (1) whether the Tax Court is limited to making adjustments in the value of the particular items included in the deficiency notice and (2) whether the Tax Court as valuation is supported by substantial evidence.

The Commissioner's deficiency notice to petitioners did not include the mineral interests as a separate item in determining the value of each of the tracts of land involved. It is petitioners' contention that for this reason the Tax Court should have valued the lands without consideration of the minerals therein. In making its re-determination of tax liability the Tax Court is free to consider all elements reflected in the record. In *Berstein v. Commissioner* 267 F.2d 879 (1959) this Court, in approving the Tax Court's decision, said at p. 881:

> "The taxpayer takes the position before us that the Tax Court's findings and decision depart from and are not responsive to the issues as they were submitted to the Tax Court. . . It is immaterial whether the Commissioner proceeded upon a wrong theory in determining the deficiency, and the taxpayer has the burden of showing that the assessment is wrong on any proper theory."

While not of significance it might be pointed out that the value found by the Tax Court in the case of each piece of land was less than set out in the deficiency notice even with the inclusion of the mineral interests in the lands conveyed.

With reference to the second and principal question the Tax Court's valuation of the lands involved is supported by substantial evidence. In determining the value of each tract the Court recognized the mineral interests, timber, and young growth as well as the bare land. It was, however, not necessary to list the value of each of these items. The Court's findings have basis in the record, are detailed as to each tract of land and its conclusions are well reasoned.

The decision is

AFFIRMED

APPENDIX "C".

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24299

D. C. Docket No. CA 5715-63 and No. 5716-63

MARGARET THOMAS POWE, WILLIAM A. POWE,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of Decision of the Tax Court of the United States (Mississippi Case.)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the petition of Margaret Thomas Powe, William A. Powe, for review of a decision of the Tax Court of the United States, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, affirmed.

December 18, 1967

Issued as Mandate: MAR 4 1968

APPENDIX "D".

Filed Feb. 23, 1968.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24299

MARGARET THOMAS POWE, WILLIAM A. POWE,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of a Decision of the Tax Court of the United States. (Mississippi Case.)

ON PETITION FOR REHEARING EN BANC

(February 23, 1968)

Before HONS. RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.